

SERVED: August 25, 1994

NTSB Order No. EA-4238

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 17th day of August, 1994

_____	)	
Petition of	)	
	)	
ED THORNTON	)	
	)	
for review of the denial by	)	Docket CD-27
the Administrator of the	)	
Federal Aviation Administration	)	
of the issuance of a certificate.)	)	
_____	)	

**OPINION AND ORDER**

Petitioner has appealed from an order issued by Administrative Law Judge Jerrell R. Davis on December 11, 1992, granting the Administrator's motion to dismiss petitioner's petition for review based on lack of jurisdiction and terminating the proceeding.<sup>1</sup> As further discussed below, petitioner's appeal is denied and the dismissal is affirmed.

By letter dated August 27, 1992, the FAA's Honolulu Flight Standards District Office (FSDO) addressed several issues pertaining to petitioner's application, on behalf of Equator

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<sup>1</sup> A copy of the order is attached.

Traders, Ltd., for an operating certificate under 14 C.F.R. Part 125. As relevant to this proceeding, the letter rejected petitioner's proposed designation of himself as Director of Operations of the planned Part 125 operation. That rejection was based on the FAA's determination that petitioner had not demonstrated a positive compliance attitude. The letter also addressed petitioner's separate request for an "authorization in lieu of a type rating" for the purpose of training, pursuant to 14 C.F.R. 61.31(b)(1).<sup>2</sup> That request was denied based on the

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<sup>2</sup> **§ 61.31 General limitations.**

(a) *Type ratings required.* A person may not act as pilot in command of any of the following aircraft unless he holds a type rating for that aircraft:

- (1) A large aircraft (except lighter-than-air).
- (2) A helicopter, for operations requiring an airline transport pilot certificate.
- (3) A turbojet powered airplane.
- (4) Other aircraft specified by the Administrator through aircraft type certificate procedures.

(b) *Authorization in lieu of a type rating.* (1) In lieu of a type rating required under paragraphs (a)(1), (3), and (4) of this section, an aircraft may be operated under an authorization issued by the Administrator, for a flight or series of flights within the United States, if --

(i) The particular operation for which the authorization is requested involves a ferry flight, a practice or training flight, a flight test for a pilot type rating, or a test flight of an aircraft, for a period that does not exceed 60 days;

(ii) The applicant shows that compliance with paragraph (a) of this section is impracticable for the particular operation; and

(iii) The Administrator finds that an equivalent level of safety may be achieved through operating limitations on the authorization.

(2) Aircraft operated under an authorization issued under this paragraph --

- (i) May not be operated for compensation or hire; and
- (ii) May carry only flight crewmembers necessary for the flight.

conclusion that an equivalent level of safety could not be achieved [see section 61.31(b)(1)(iii)], due primarily to "lack of pilot proficiency."

Petitioner subsequently petitioned the Board for review of the "determination made against me by the FAA revolving around the issuance of a part 125 certificate," and attached a copy of the August 27 letter summarized above. Although it is unclear from the record how petitioner's request for an "authorization in lieu of a type rating" under section 61.31 was related to his application for a Part 125 certificate, subsequent filings in this case make clear that petitioner seeks our review of the FAA's denial of that request, as well as the FAA's determination that he is not qualified to serve as Director of Operations of Equator Traders, Ltd.

On November 18, 1992, the Administrator filed a motion to dismiss the petition for review for lack of jurisdiction. The Administrator noted that section 602(b) of the Federal Aviation Act (49 U.S.C. 1422(b)) empowers the Board to review only the denial of "airman certificates", not denials of Part 125 certificates<sup>3</sup> or of positions such as Director of Operations. In

(..continued)

(3) An authorization issued under this paragraph may be reissued for an additional 60-day period for the same operation if the applicant shows that he was prevented from carrying out the purpose of the particular operation before his authorization expired.

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<sup>3</sup> By the time the Administrator filed his motion to dismiss, the denial of a Part 125 certificate was a moot issue, since Equator Traders, Ltd. had been granted a Part 125 operating certificate on September 14, 1992.

his opposition to the motion to dismiss, petitioner asserted that the Board has jurisdiction under section 609 of the Federal Aviation Act (49 U.S.C. 1429) to review the determination that he lacks qualifications to be Director of Operations, and that it has jurisdiction under section 602 of that Act to review the denial of an "authorization in lieu of a type rating."

On December 11, 1992, the law judge granted the Administrator's motion to dismiss for lack of jurisdiction and terminated the proceeding without discussion. Petitioner appealed from that order, and the parties submitted briefs essentially reiterating their stated positions before the law judge.

There can be little doubt that our jurisdiction to review certificate actions by the FAA (under either section 602 or 609 of the Federal Aviation Act) does not extend to the FAA's determination that petitioner lacks qualifications to serve as Director of Operations of a Part 125 operator, and we so hold.<sup>4</sup>

The other issue in this case is less straightforward. Upon his review of the record, our General Counsel determined that, in light of the fact that neither the Administrator nor the law

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<sup>4</sup> That is not to say, however, that no review is available for that determination. Indeed, in denying petitioner's request for an FAA hearing on this issue under 14 C.F.R. Part 13, the Manager of the FAA's Enforcement Litigation Branch in Washington, D.C., explained that the FSDO's adverse determination is subject to review by the regional Flight Standards Division Manager, whose decision is reviewable by the FAA's Director of Flight Standards. This decision, it was further explained, constitutes a final agency action which is appealable to a U.S. Court of Appeals pursuant to section 1006 of the Federal Aviation Act (49 U.S.C. 1486).

judge specifically addressed the Board's authority to review the denial of an "authorization in lieu of a type rating" under section 61.31, the case should not be submitted for our review until the views of the parties were solicited. In Petition of Thornton, NTSB Order No. EA-4131 (March 24, 1994), our General Counsel requested comments on that issue.

In his response to Order No. EA-4131, the Administrator<sup>5</sup> asserts that the review provisions of section 602 of the Federal Aviation Act were not intended to create a general recourse for grievances by airmen. He submits that an "authorization in lieu of a type rating" is not an "airman certificate" within the meaning of section 602, and submits that not even the denial of a full-fledged type rating would be reviewable under that section.

While the Administrator is clearly wrong in suggesting that we have no authority over type ratings,<sup>6</sup> we agree that we have no jurisdiction to review an "authorization in lieu of a type rating."

Our holding that we lack jurisdiction over the denial of an "authorization in lieu of a type rating" under 14 C.F.R. 61.31(b)(1) is based on our conclusion that the grant of such an "authorization" essentially constitutes an exemption from the

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<sup>5</sup> Petitioner did not submit further comments in response to the request.

<sup>6</sup> We have long accepted jurisdiction (without objection from the Administrator) over appeals from denials or suspensions of aircraft type ratings. See e.g., Administrator v. Ruggiero, NTSB Order No. EA-4077 (1994); Administrator v. Reinhold, NTSB Order No. EA-3973 (1993); Administrator v. Terwilliger, 1 NTSB 1096 (1971); Administrator v. Harrington, 1 NTSB 1042 (1971).

regulation, committed to the discretion of the Administrator.<sup>7</sup> It is well-established that we have no authority to review the Administrator's exemption decisions, as those decisions are a form of individualized rulemaking over which the U.S. Courts of Appeal have exclusive review authority. Administrator v. Worldwide Airlines, 5 NTSB 1363 (1986).<sup>8</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Petitioner's appeal is denied; and
2. The dismissal of the petition for lack of jurisdiction is affirmed, as discussed in this opinion and order.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

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<sup>7</sup> In our judgment, the language of section 61.31 makes clear that the Administrator is never required to grant an "authorization in lieu of a type rating," but that the decision is a purely discretionary one.

<sup>8</sup> As we acknowledged in Worldwide Airlines, the D.C. Circuit held in Priority Air Dispatch v. NTSB, 514 F.2d 1335 (1975) that the Board's review power does extend to the *termination* of an exemption that served as "an essential component of the operating authority of the airline." However, as in Worldwide Airlines, the challenged decision in the instant case involved no curtailment of any prior authorization or exemption.